

S. 2190. A bill to amend the securities laws to provide for registration exemptions for certain crowd-funded securities, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

#### SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Mr. DURBIN (for himself, Mr. KIRK, and Mrs. SHAHEEN):

S. Res. 395. A resolution expressing the sense of the Senate in support of the North Atlantic Treaty Organization and the NATO summit to be held in Chicago, Illinois from May 20 through 21, 2012; to the Committee on Foreign Relations.

#### ADDITIONAL COSPONSORS

S. 339

At the request of Mr. BAUCUS, the name of the Senator from Michigan (Ms. STABENOW) was added as a cosponsor of S. 339, a bill to amend the Internal Revenue Code of 1986 to make permanent the special rule for contributions of qualified conservation contributions.

S. 414

At the request of Mr. DURBIN, the name of the Senator from Minnesota (Mr. FRANKEN) was added as a cosponsor of S. 414, a bill to protect girls in developing countries through the prevention of child marriage, and for other purposes.

S. 418

At the request of Mr. HARKIN, the name of the Senator from New Hampshire (Mrs. SHAHEEN) was added as a cosponsor of S. 418, a bill to award a Congressional Gold Medal to the World War II members of the Civil Air Patrol.

S. 1335

At the request of Mr. INHOFE, the name of the Senator from New Hampshire (Mrs. SHAHEEN) was added as a cosponsor of S. 1335, a bill to amend title 49, United States Code, to provide rights for pilots, and for other purposes.

S. 1770

At the request of Mrs. GILLIBRAND, the name of the Senator from Alaska (Mr. BEGICH) was added as a cosponsor of S. 1770, a bill to prohibit discrimination in adoption or foster care placements based on the sexual orientation, gender identity, or marital status of any prospective adoptive or foster parent, or the sexual orientation or gender identity of the child involved.

S. 1855

At the request of Mr. BURR, the name of the Senator from Connecticut (Mr. BLUMENTHAL) was added as a cosponsor of S. 1855, a bill to amend the Public Health Service Act to reauthorize various programs under the Pandemic and All-Hazards Preparedness Act.

S. 1884

At the request of Mr. DURBIN, the name of the Senator from Oregon (Mr.

MERKLEY) was added as a cosponsor of S. 1884, a bill to provide States with incentives to require elementary schools and secondary schools to maintain, and permit school personnel to administer, epinephrine at schools.

S. 1925

At the request of Mr. LEAHY, the name of the Senator from Maine (Ms. SNOWE) was added as a cosponsor of S. 1925, a bill to reauthorize the Violence Against Women Act of 1994.

S. 1973

At the request of Mrs. GILLIBRAND, the name of the Senator from Hawaii (Mr. AKAKA) was added as a cosponsor of S. 1973, a bill to prevent gun trafficking in the United States.

S. 1990

At the request of Mr. LIEBERMAN, the names of the Senator from Delaware (Mr. CARPER) and the Senator from Nevada (Mr. HELLER) were added as cosponsors of S. 1990, a bill to require the Transportation Security Administration to comply with the Uniformed Services Employment and Reemployment Rights Act.

S. 2076

At the request of Mr. FRANKEN, the name of the Senator from South Carolina (Mr. GRAHAM) was added as a cosponsor of S. 2076, a bill to improve security at State and local courthouses.

S. 2123

At the request of Mr. MENENDEZ, the name of the Senator from Massachusetts (Mr. KERRY) was added as a cosponsor of S. 2123, a bill to amend title V of the Social Security Act to extend funding for family-to-family health information centers to help families of children with disabilities or special health care needs make informed choices about health care for their children.

S. 2145

At the request of Mr. KERRY, the name of the Senator from Maryland (Mr. CARDIN) was added as a cosponsor of S. 2145, a bill to amend the Internal Revenue Code of 1986 to permit the Secretary of the Treasury to issue prospective guidance clarifying the employment status of individuals for purposes of employment taxes and to prevent retroactive assessments with respect to such clarifications.

S. 2155

At the request of Mr. MERKLEY, his name was added as a cosponsor of S. 2155, a bill to amend the Farm Security and Rural Investment Act of 2002 to promote biobased manufacturing.

S. 2179

At the request of Mr. WEBB, the name of the Senator from Massachusetts (Mr. KERRY) was added as a cosponsor of S. 2179, a bill to amend title 38, United States Code, to improve oversight of educational assistance provided under laws administered by the Secretary of Veterans Affairs and the Secretary of Defense, and for other purposes.

S. 2184

At the request of Mr. KERRY, the name of the Senator from New Jersey

(Mr. MENENDEZ) was added as a cosponsor of S. 2184, a bill to provide exclusive funding to support fisheries and the communities that rely upon them, to clear unnecessary regulatory burdens and streamline Federal fisheries management, and for other purposes.

S. 2186

At the request of Mr. DEMINT, the name of the Senator from Missouri (Mr. BLUNT) was added as a cosponsor of S. 2186, a bill to amend the Americans with Disabilities Act of 1990 to prohibit the Attorney General from administering or enforcing certain accessibility regulations relating to pools at public accommodations or provided by public entities.

S. RES. 380

At the request of Mr. JOHANNIS, his name was added as a cosponsor of S. Res. 380, a resolution to express the sense of the Senate regarding the importance of preventing the Government of Iran from acquiring nuclear weapons capability.

At the request of Mr. GRAHAM, the name of the Senator from Missouri (Mr. BLUNT) was added as a cosponsor of S. Res. 380, *supra*.

S. RES. 385

At the request of Mr. JOHANNIS, his name was added as a cosponsor of S. Res. 385, a resolution condemning the Government of Iran for its continued persecution, imprisonment, and sentencing of Youcef Nadarkhani on the charge of apostasy.

S. RES. 391

At the request of Mr. WYDEN, the name of the Senator from California (Mrs. FEINSTEIN) was added as a cosponsor of S. Res. 391, a resolution condemning violence by the Government of Syria against journalists, and expressing the sense of the Senate on freedom of the press in Syria.

AMENDMENT NO. 1617

At the request of Ms. KLOBUCHAR, the name of the Senator from Indiana (Mr. LUGAR) was added as a cosponsor of amendment No. 1617 proposed to S. 1813, a bill to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes.

AMENDMENT NO. 1661

At the request of Ms. KLOBUCHAR, the name of the Senator from Massachusetts (Mr. BROWN) was added as a cosponsor of amendment No. 1661 intended to be proposed to S. 1813, a bill to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes.

AMENDMENT NO. 1793

At the request of Mrs. FEINSTEIN, the name of the Senator from Minnesota (Ms. KLOBUCHAR) was added as a cosponsor of amendment No. 1793 intended to be proposed to S. 1813, a bill to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes.

AMENDMENT NO. 1814

At the request of Mr. MERKLEY, the names of the Senator from Montana

(Mr. TESTER), the Senator from Missouri (Mrs. MCCASKILL) and the Senator from Indiana (Mr. LUGAR) were added as cosponsors of amendment No. 1814 proposed to S. 1813, a bill to reauthorize Federal-aid highway and highway safety construction programs, and for other purposes.

At the request of Ms. KLOBUCHAR, her name was added as a cosponsor of amendment No. 1814 proposed to S. 1813, *supra*.

#### STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. HARKIN (for himself, Mr. GRASSLEY, and Mr. LEAHY):

S. 2189. A bill to amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal antidiscrimination and antiretaliation claims, and for other purposes; to the Committee on Health, Education, Labor, and Pensions.

Mr. HARKIN: Mr. President, today I join with my senior colleague from Iowa, Senator GRASSLEY, and with the distinguished chair of the Judiciary Committee, Senator LEAHY, in introducing the Protecting Older Workers Against Discrimination Act.

The need for this legislation was vividly demonstrated by the experience of an Iowan—Jack Gross. Mr. Gross gave the prime of his life, a quarter century of loyal service, to one company. Despite Mr. Gross's stellar work record, the company brazenly demoted him and gave his job to a younger employee.

Expressly to prevent this kind of discrimination, over 40 years ago Congress passed the Age Discrimination in Employment Act, ADEA. Modeled from and using the same language as Title VII of the Civil Rights Act of 1964—which prohibits employment discrimination on the basis of race, sex, national origin and religion—the ADEA makes it unlawful to discriminate on the basis of age.

When Mr. Gross sought to enforce his rights under this law, a jury of Iowans heard the facts and found that his employer discriminated against him because of his age. That jury awarded him almost \$47,000 in lost compensation.

The case was ultimately appealed to the Supreme Court. In June 2009, in *Gross v. FBL Financial, Inc.*, five justices effectively rewrote the law and ruled against Mr. Gross. In doing so, the Court made it harder for those with legitimate age discrimination claims to prevail under the ADEA. In fact, on remand, despite the fact Mr. Gross had established that age discrimination was a factor in his demotion, he lost his retrial.

For decades, the law was clear. In 1989, in *Price Waterhouse v. Hopkins*, the Court ruled that if a plaintiff seeking relief under Title VII of the Civil Rights Act demonstrated that dis-

crimination was a “motivating” or “substantial” factor behind the employer's action, the burden shifted to the employer to show it would have taken the same action regardless of the plaintiff's membership in a protected class. As part of the Civil Rights Act of 1991, Congress codified the “motivating factor” standard with respect to Title VII discrimination claims.

Since the ADEA uses the same language as Title VII, was modeled from it, and had been interpreted consistent with the Civil Rights Act, courts rightly and consistently held that, like a plaintiff claiming discrimination on the basis of race, sex, religion and national origin, a victim bringing suit under the ADEA need only show that membership in a protected class was a “motivating factor” in an employer's action. If an employee showed that age was one factor in an employment decision, the burden was on the employer to show it had acted for a legitimate reason other than age.

In *Gross*, the Court, addressing a question on which it did not grant certiorari, tore up this decades' old standard. In its place, the Court imposed a standard that makes it prohibitively difficult for a victim to prove age discrimination. According to the Court, a plaintiff bears the full burden of proving that age was not only a “motivating” factor but the “but for” factor, or decisive factor. And, unfortunately, lower courts have applied *Gross* to other civil rights claims, including cases arising under the Americans with Disabilities Act, the Rehabilitation Act and retaliation cases under Title VII of the Civil Rights Act of 1964.

The extremely high burden *Gross* imposes radically undermines workers' ability to hold employers accountable. Bear in mind, unlawful discrimination is often difficult to detect. Obviously, those who discriminate do not often admit they are acting for discriminatory reasons. Employers rarely post signs saying, for example, “older workers need not apply.” To the contrary, they go out of their way to conceal their true intent. And, only the employer is in a position to know his own mind and offer an explanation of why a decision that involves discrimination or retaliation was actually motivated by legitimate reasons. By putting the entire burden on the worker to demonstrate the absence or insignificance of other factors, the Court in effect has freed employers to discriminate or retaliate.

Unfortunately, as Mr. Gross and his colleagues know all too well, age discrimination does indeed occur. Countless thousands of American workers who are not yet ready to voluntarily retire find themselves jobless or passed over for promotions because of age discrimination. Older workers often face stereotypes: That they are not as productive as younger workers; that they cannot learn new skills; that they somehow have a lesser need for income to provide for their families.

Indeed, according to an AARP study, 60 percent of older workers have reported that they or someone they know has faced age discrimination in the workplace. According to the Equal Employment Opportunity Commission, in fiscal year 2011, over 23,000 age discrimination claims were filed, a more than 20 percent increase from just four years ago. And, given the stereotypes that older workers face, it is no surprise that on average they remain unemployed for more than twice as long as all unemployed workers.

The Protecting Older Workers Against Discrimination Act reiterates the principle that Congress established when it passed the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act and the Americans with Disabilities Act—when making employment decisions it is illegal for race, sex, national origin, religion, age or disability to be a factor.

The bill repudiates the Supreme Court's *Gross v. FBL Financial* decision and will restore the law to what it was for decades. It makes clear that when an employee shows discrimination was a “motivating factor” behind a decision, the burden is properly on the employer to show the same decision would have been made regardless of discrimination or retaliation. And, like the Civil Rights Act of 1991 with respect to discrimination cases under Title VII, if the employer meets that burden, the employer remains liable, but remedies are limited.

This is a common sense, bipartisan bill. In fact, the Civil Rights Act of 1991, key provisions of which served as a model for this legislation, passed the Senate on a bipartisan basis 93-5. Further, we are introducing this bill only after countless hours of consultation with civil rights stakeholders and representatives of the business community. Moreover, this bill addresses many of the concerns that were raised about an earlier version of the bill at a hearing held before the Health, Education, Labor, and Pensions Committee in March 2010.

In fact, I want to comment on two changes from that earlier version of this bill introduced in the last Congress. Since October 2009, when Senator LEAHY and I first introduced the Protecting Older Workers Against Discrimination Act, we have had the benefit of nearly two and a half years of lower court application of the *Gross* decision.

The 2009 bill would have expressly amended the ADEA to make clear that the analytical framework set out in *McDonnell Douglas v. Green* applied to that statute. Even though, before *Gross*, every Court of Appeals had held that *McDonnell Douglas* had applied to age claims, this clarification was meant to address a footnote in *Gross* in which the Court arguably questioned the applicability of *McDonnell Douglas* to the ADEA. Since the bill was first introduced, however, every lower court